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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARION C. WOLFE, JR.,

Plaintiff and Appellant,

v.

C. EMMETT MAHLE,

Defendant and Respondent.

C044300

(Super. Ct. No.
02AS03043)

Following his conviction in February 2001 for possession of heroin and cocaine, plaintiff Marion C. Wolfe, appearing in propria persona, sued defendant County of Sacramento, its indigent defense panel, and attorneys Ron Castro, Emmett Mahle, Joel Deckler and Richard Corbin. The first cause of action alleged legal malpractice against the individually named attorneys. The second cause of action alleged false imprisonment against Sacramento County and its indigent defense panel, and claimed punitive damages.

Defendant C. Emmett Mahle successfully demurred to the first cause of action of the first amended complaint. The trial

court dismissed the complaint against Mahle without leave to amend and this appeal followed.

Here, Wolfe contends: (1) he filed his civil complaint in a timely manner and the trial court erred in denying his motion to correct the filing date; (2) the eight-day delay in filing should have been tolled under Code of Civil Procedure section 340.6, subdivision (a)(4) (further undesignated statutory references are to the Code of Civil Procedure); (3) the trial court erred in taking judicial notice of "facts extrinsic to the pleading to defeat the complaint"; (4) the trial court erred in denying him equal access to the court by telephonic appearance; and (5) the trial court lacked subject matter jurisdiction of his claim in excess of the \$75,000 statutory limit. He also seeks costs on appeal. We affirm the judgment.

FACTS AND PROCEEDINGS

Wolfe pleaded no contest to possession of heroin and cocaine (Health & Saf. Code, § 11350, subd. (a)), and admitted a prior strike conviction and three prior prison terms in exchange for a stipulated sentence of nine years and the dismissal of three drug-related offenses. (*People v. Wolfe* (June 11, 2002, C037828) [nonpub. opn.], p. 1.) He was sentenced on May 14, 2001, and is currently incarcerated at Folsom State Prison.

On May 3, 2002, Wolfe attempted to file his civil complaint in Sacramento County Superior Court. The clerk returned the papers with a form that gave the following reasons: (1) "Forms must be submitted in triplicate"; (2) "Papers presented for

filing shall be prepunched with two holes at the top centered pursuant to Local Rule 9.08(B)"; and (3) "\$205.00 filing fee or fee waiver is required." Under a space designated "Other" at the bottom of the page, the clerk further explained, "We are unable to process your documents unless a fee of \$205.00 or a completed fee waiver is submitted. All your copies of the complaint have to be attached. We cannot do that for you. Submit all documents in triplicate and return, along with a fee waiver or fee. [¶] Complete all areas where indicated in pink highlighter." Wolfe made the corrections and his complaint was filed on May 22, 2002.

Wolfe's first complaint alleged in the first cause of action that individually-named defendants who represented Wolfe in the criminal action, including Mahle, "were negligent in failing to perform as . . . reasonably competent attorney[s] in a criminal case which protected [his] Constitutional Right to Arraignment [and] entry of a plea during Arraignment."

Mahle demurred to the first complaint and the trial court sustained his demurrer. The trial court noted that in order to maintain a legal malpractice action following a criminal conviction, plaintiff must establish actual innocence. Wolfe's complaint did not contain those allegations. The court also observed that because Wolfe must have been aware of the alleged malpractice at the time of arraignment or "at the latest when he was sentenced on May 14, 2001," the complaint was barred by the one-year statute of limitations. Even so, the trial court granted Wolfe leave to amend his complaint.

Wolfe filed his amended complaint on January 21, 2003. He alleged in the first cause of action that Mahle, who represented him "through 10-20-00," breached the professional duties owed Wolfe "in that [he] failed to take appropriate actions to investigate, file appropriate motions to protect Plaintiffs [sic] Constitutional Due Process rights to enter a plea, after being apprised of Plaintiff's specific desire to enter a plea to Case # 99F04609, for which current imprisonment is based. After learning (or you should have learned) such a Constitutional Violation had occurred, you continued to conceal the act(s) of you and colleagues' (AGENTS whom also worked for the County of Sacramento through the Indigent Defense Panel) and deliberately worked inconcert [sic], overlooking the fact that Plaintiff was not represented by Counsel during alleged June 7, 1999 arraignment, and disguised documents to appear as though plaintiff was arraigned. . . . [¶] . . . After specifically requesting C. Emmett Mahle to motion the court to enter a Plea, you displayed ineptitude or lack of industry to perform any act(s) to protect this clearly established Statutory California law; violating Const. Art. §§ 1, 6, and 14 mandate. Any motion for due process violation would have merit. BEING A CLEAR VIOLATION OF STATUTORY RIGHTS, of which you did nothing to rectify this Constitutional Violation, contrary to a legal duty created by state regulations alone, makes you personally liable for your act or omission to act after being apprised by Plaintiff of such a desire to enter a plea to 99F04609.

[¶] This error was compounded when: (1) your colleague

cleverly coerced plaintiff (under false pretext) into entering a plea of guilt, even though plaintiff maintained his innocence, and was legally not guilty, which subsequently resulted in Imprisonment without ever being arraigned or entering a plea during arraignment."

On the same date, Wolfe filed what he described as a motion to correct the filing date of his complaint to May 3, 2002. He argued that his complaint should have been deemed filed on the date he first submitted it, in spite of the legal shortcomings noted above.

Mahle again demurred. The trial court sustained the demurrer without leave to amend for failure to state facts sufficient to constitute a cause of action. It stated: "This court has already determined that plaintiff must have known of his injury no later than May 14, 2001, the day he was sentenced. Plaintiff had one year from that date to file his complaint against defendant. [Code of Civil Procedure] section 340.6. Plaintiff filed his complaint on May 22, 2002. In a separate, but related ruling, the court denied plaintiff's 'motion to correct filing date to May 3, 2002.' Plaintiff's complaint is therefore barred by the statute of limitations."

DISCUSSION

I

General Principles

Section 430.30, subdivision (a) provides: "When any ground for objection to a complaint . . . appears on the face thereof,

or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading."

In an appeal from a judgment of dismissal entered after the trial court sustains a demurrer, "'we assume the truth of all properly pleaded material allegations of the complaint [citations] and give it a reasonable interpretation by reading it as a whole and its parts in their context. [Citation.]' [Citation.] If the demurrer was sustained, as it was in this case, our function is to determine whether the complaint states sufficient facts to state a cause of action; and if it was sustained, as it was here, without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]' [Citations.]" (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1381.)

We will affirm the judgment if correct on any theory of law applicable to the case. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

II

The Statute of Limitations

Section 340.6 establishes a one-year statute of limitations for actions against attorneys for legal malpractice.

Subdivision (a)(4) authorizes tolling of the one-year statute for up to four years when "[t]he plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action." Wolfe argues the eight-day delay in filing should have been tolled because his custodians at Deuel Vocational Institution (DVI), where he was then housed, did not provide him with the necessary forms he requested. Wolfe raised the issue in his motion to change the filing date. The questions raised in that motion are not moot, as Mahle contends, because the trial court ruled the complaint insufficient on statute of limitations grounds.

Although section 340.6 authorizes tolling of the statute of limitations, it does not indicate *how long* a legal disability such as a criminal conviction tolls the period for filing a legal malpractice action. Ignored by both parties is section 352.1, subdivision (a), which completes the analysis. That statute reads: "If a person entitled to bring an action, mentioned in Chapter 3 [which includes section 340.6], is, at the time the cause of action accrued, imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the time of that disability is not a part of the time limited for the commencement of the action, not to exceed two years."

Before enactment of the Prisoner's Bill of Rights in 1975 (Pen. Code, § 2601), persons incarcerated on criminal convictions were not allowed to file civil suits while in prison. Statutes of limitation on civil actions were tolled for

the entire duration of their incarceration. In 1994, the Department of Justice and the California Correctional Peace Officer's Association urged the Legislature to limit the tolling period to two years in response to an increasing number of often frivolous civil actions filed by inmates since 1975. (Sen. Com. on Judiciary, 3d reading analysis of Sen. Bill No. 1445 (1993-1994 Reg. Sess.) as amended Aug. 9, 1994.)

The trial court ruled that Wolfe's cause of action for legal malpractice accrued "no later than May 14, 2001, the day he was sentenced." Wolfe was, on that date, under the sentence of a criminal court for a term of nine years. (*People v. Wolfe*, *supra*, p. 1.) Therefore, at the time of his filings, Wolfe was under a legal disability within the meaning of section 340.6 as referred to in section 352.1. Thus, section 352.1 tolled the one-year statute of limitations for filing the legal malpractice action for two years or until, approximately, May 13, 2003. We therefore conclude that Wolfe's complaint was timely when filed on May 22, 2002.

Given our resolution of the statute of limitations issue, we need not consider whether Wolfe's earlier attempt at filing the complaint was defective. Wolfe's claim that the trial court should have stayed his legal malpractice action altogether, and not entertained the demurrers, while he pursued post-conviction relief is also moot. (See *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194 (*Coscia*).)

III

Actual Innocence

Although the trial court erred in sustaining the demurrer on statute of limitations grounds, a second, and fatal, defect appears on the face of the pleading. Wolfe alleged in his first amended complaint that he "was legally not guilty," a necessary element in an action for legal malpractice in the criminal context. (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 545.) "[A]n individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action." (*Coscia, supra*, 25 Cal.4th at p. 1201.)

As we have in the past explained, "[w]hen reviewing a demurrer on appeal, appellate courts generally assume that all facts pleaded in the complaint are true. [Citations.] In addition, in the interests of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are not set forth in the complaint. [Citation.] In particular, appellate courts should judicially notice any fact of which the trial court took proper judicial notice. (Evid. Code, § 459, subd. (a).)" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877, fn. omitted; see § 430.30, subd. (a).)

Contrary to Wolfe's argument on appeal, the trial court did not err in taking judicial notice of his conviction while that conviction was being challenged on appeal. While we do not know what the request included because Wolfe did not include the

document in his designation of the record on appeal, it included, at minimum, the abstract of judgment or other document showing the May 14, 2001, date of conviction and/or our decision affirming the judgment of conviction in the criminal case, because the court cited those facts in its minute order. Similarly, we may take judicial notice of the records of this court under Evidence Code section 452, subdivision (d).

Judicially noticed evidence reveals that Wolfe has exhausted his post-conviction remedies. We affirmed his criminal conviction. (*People v. Wolfe, supra*, pp. 2, 12.) The California Supreme Court denied habeas corpus relief on September 18, 2002. Wolfe cites nothing in the trial court record or subject to judicial notice to establish his factual innocence of the criminal offense to which he pleaded no contest in 2002. (*Id.* at p. 1.) We therefore conclude his first amended complaint fails to state facts sufficient to constitute a cause of action for legal malpractice.

IV

Telephone Access

Wolfe asserts the trial court denied him a fair hearing by ignoring his repeated requests to transfer the case to a courtroom that provided telephone access for prisoners. He says he was prejudiced because the court's lack of response "unquestionably resulted in several biased proceedings, without equal protection, as guaranteed by the United States Constitutions Fifth and Fourteenth Amendments."

Telephonic appearances are authorized by local rules. (Super. Ct. Sacramento County, Local Rules, rules 3.00(J), 9.10.) But we do not know if there are procedures for setting up confidential telephone calls at Folsom State Prison. In any event, Wolfe fails to show he was prejudiced in the matter presently before us. He cites two requests for "court call" and telephonic appearance. The first was a December 19, 2002 request for a hearing on the attorney's compliance statement. The court continued the hearing and there is no further mention of a telephonic appearance. The second was a January 6, 2003 request for a telephonic, court call appearance at the hearing on the demurrer filed by M. Galileo Morales. There is nothing in the record to indicate that either of these requests related to defendant Mahle. A judgment of the lower court is presumed correct and error must be affirmatively shown. (*People v. Andrade* (2000) 79 Cal.App.4th 651, 654, fn. 1.) We reject Wolfe's contention.

VI

Subject Matter Jurisdiction

As a final matter, Wolfe argues that the Sacramento Superior Court lacked subject matter jurisdiction because his claim was in excess of \$75,000, and the Code of Civil Procedure mandates transfer to the appropriate court having original jurisdiction. Wolfe misreads the law in this regard. We are unaware of any current statute that divests the superior court of jurisdiction of a negligence claim in excess of \$75,000. Moreover, the federal procedure cited by Wolfe authorizes only a

defendant to remove a proper case to federal court that has jurisdiction. (28 U.S.C. § 1441.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

DAVIS, Acting P.J.

ROBIE, J.